

NATALIA KEPUK ET AL.

IBLA 75-497A
75-497D
76-72

Decided November 26, 1980

Petitions for reconsideration of the Board's decisions in Natalia Kepuk, 23 IBLA 99 (1975), Kathryn Eluska, 23 IBLA 284 (1976), and Pavilla Pauk, 23 IBLA 151 (1975), affirming the denial of various Native allotment applications.

Petitions granted; cases remanded.

1. Administrative Procedure: Hearings -- Alaska: Native Allotments --
Rules of Practice: Hearings

Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

APPEARANCES: Lucy M. Lowden, Esq., and Carmen L. Massey, Esq., Alaska Legal Services Corporation, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Natalia Kepuk, Kathryn Eluska, and Pavilla Pauk have each petitioned for reconsideration of separate decisions of this Board affirming decisions of the Alaska State Office, Bureau of Land Management

(BLM), denying each appellant's Native allotment application for failure to comply with the use and occupancy requirements. ^{1/} In their petitions, each appellant urges that there are disputed questions of fact with respect to the use and occupancy of their respective allotment lands and that, pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), she or he is entitled to notice and a hearing at which each may present evidence to establish her or his use and occupancy of the lands.

[1] In Pence v. Kleppe, supra, the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute, due process requires that:

[A]pplicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

Following that decision, the Board ruled that the Departmental contest procedures, 43 CFR 4.451-1 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, 311-12, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The Ninth Circuit Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

We have re-examined the records for each decision and found that each appellant made at least minimal assertions of facts which contradict the field reports prepared by BLM. On reconsideration, we find that each appellant is entitled to a hearing and direct that BLM initiate contest proceedings in each case. In the case of Natalia Kepuk we note that the dispute involves questions not only as to her 5 years use and occupancy but also as to alleged abandonment of the allotment.

^{1/} Natalia Kepuk, 23 IBLA 99 (1975) (IBLA 75-497A), affirmed denial of Native allotment application AA-6289; Kathryn Eluska, 23 IBLA 284 (1976) (IBLA 79-497D), affirmed denial of Native allotment application F-13949; and Pavilla Pauk, 23 IBLA 151 (1975) (IBLA 76-72), affirmed denial of Native allotment application AA-7159.

In the case of Pavilla Pauk, the dispute centers first on the correct location of the allotment and then on the required use and occupancy. These matters should be addressed at the hearings.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petitions for reconsideration are granted and the cases remanded to BLM for initiation of contest proceedings.

James L. Burski
Administrative Judge

We concur:

Frederick Fishman
Administrative Judge

Douglas E. Henriques
Administrative Judge

